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Emily Ward
University of Illinois

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State Records Laws and the Electronic Business Environment: A Sisyphean Burden?

Emily Ward, University of Illinois Archives

To promote government transparency and accountability in the eyes of the public, most states have adopted legislation that regulates how state agencies will manage state records. In Illinois, this law is the State Records Act. The Illinois State Records Act defines state records, outlines how these records shall be maintained, and regulates the disposal of said records. When comparing state records laws, particularly regarding how they apply to the electronic business environment, the question that quickly arises is: how do these laws ensure their intention is accomplished? In other words, how do they ensure evidence of state business activities is responsibly managed? Some might say the intention and actual effect of the laws are like parallel lines, firmly in place, and destined never to intersect. Others have said achieving compliance with the laws is as futile as Sisyphus' efforts to move his rock to the top of the hill.

Over and over again, those of us involved in developing sustainable practices for managing records and information are asked a simple question that is not always so easy to answer: "What is a record?" In response, we sometimes turn to the various definitions provided by the archives and records management professions. However, those of us who work at agencies in the state of Illinois are compelled to turn to the Illinois State Records Act. According to the Act, records are:

All books, papers, digitized electronic material, maps, photographs, databases, or other official documentary materials, regardless of physical form or characteristics, made, produced, executed or received by any agency in the State in pursuance of state law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its successor as evidence of the organization, function, policies, decisions, procedures, operations, or other activities of the State or of the State Government, or because of the informational data contained therein.¹

This definition, while apparently thorough, is not particularly helpful in providing guidance on the management of records or in discerning records from non-records. It is no wonder employees keep every draft of

every document because this definition seemingly covers everything produced or received by a state agency. But does it really mean *everything*? In today's business environment, does this definition include all data within a database and the system used to manage the data, or just the data and its metadata? For transactions conducted via E-mail, is it always necessary to include the E-mail message header as part of the record? When does a draft of a document become "official documentary materials"? And at what point does pinpointing a document as "evidence of the organization, function, policies, decisions, procedures, operations, or other activities of the State..." become a futile exercise?

The above definition of a record assumes that the "official documentary materials" are trustworthy enough to serve as evidence and be considered as records. The issue of identifying what constitutes official documentary materials is challenging for both physically tangible and electronic or digital materials. But particularly for electronic or digital materials, the characteristics that assure qualification as evidence (i.e., that these materials are records) are often difficult to identify, let alone manage over time. Electronic documents are easily edited, making it easy to confuse different versions of the documents if no effort is taken to specifically establish controls. Even when documents are declared final versions and rendered static, file migration to new formats can unintentionally make alterations, leaving the accuracy or trustworthiness of the information questionable. Ultimately, we are left with electronic documents or information that may be routinely acted on in the course of daily business, but may have no means of being trusted as evidence—of being true records.

Most states have definitions of records similar to that of Illinois. However, one notable difference can be found in Pennsylvania's Right-to-Know Law, which defines a record as follows:

Information, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency. The term includes a document, paper, letter, map,

book, tape, photograph, film or sound recording, information stored or maintained electronically and a data-processed or image-processed document.²

While arguably very similar to Illinois' definition in content, the sequence of ideas implies a different level of importance. In Pennsylvania's Right-to-Know Law, the emphasis is directed more significantly to the purpose of the records (to "document a transaction or activity of an agency"), rather than to the individual document types themselves (e.g., a book, map, or photograph). By emphasizing the types of documents to be considered as records, we are positioned to focus on information that may no longer be useful when attempting to comply with the intention of state records laws. In our world of ever-evolving technologies, business practices change quickly, new document types and formats are introduced, and old ones are retired. The current language of our legislation is no longer as helpful as it may once have been. Rather than adding new words to already lengthy definitions, perhaps shifting legislation language to emphasize the purpose of the records (or, to go a step further, the purpose of the law) would prove more helpful.

Many state records laws—no matter where they place emphasis—indicate the purpose of records is to serve as evidence of the agency's organization, functions, operations, and activities. But, as argued above, the trustworthiness of electronic information is not easily verified. To ensure we have the evidence we want, we may need to capture information about agency business processes, rather than just the agency's records. Focusing on business processes rather than specific records is not a new idea when it comes to electronic records. Philip C. Bantin, in his 1998 article summarizing archival strategies for managing electronic records, suggests that when looking for evidence of an agency's work, we should not be looking to the records themselves, but to the processes, activities, and transactions that led to their creation.³

What would focusing on agency business processes mean logistically? It would mean identifying core functions and documenting the activities or transactions involved in supporting those functions. Documentation could include identification of significant data inputs and exports (records) associated with critical agency functions. But, more importantly, documentation should

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also provide information about the systems used and the controls applied to activities, or about the business processes supported by those systems. The focus shifts to ensuring the trustworthiness of the systems managing the information, rather than the specific types of records used by or created by the systems.

While collecting documentation about business processes and systems may seem daunting at first, this task might seem refreshing to anyone who has ever conducted a detailed records inventory. Systems documentation is often readily available through IT departments, which collect it as part of their business continuity planning (BCP) efforts. In many ways, BCP can be considered a modern, more expansive term for a vital records plan and a good starting point for documentation gathering. Even if BCP planning has not yet been undertaken, the systems used to support critical business functions will have at least a skeletal level of documentation available through vendors, or through requirements-gathering exercises conducted prior to the implementation of the systems.

Beyond gathering documentation, agencies could be expected to have a routine review process in place and a plan for establishing system controls to ensure the reliability of data inputs and outputs. Purging of data or electronic documents could then be conducted according to approved, routine purge cycles, perhaps on a quarterly or annual cycle.

If state agencies deemphasized inventorying records and instead prioritized documenting their business processes, the information collected would likely prove more reliable as evidence of their organization, functions, policies, decisions, procedures, operations, or other activities. This, in turn, could lead to better compliance with the intention of the state records laws. For this reason, serious consideration should be given to re-drafting state records laws, focusing less on defining records and their disposal processes, and more on encouraging documentation of business processes. Perhaps this approach can flatten the hill for our dear friend Sisyphus, so that he can finally rest and enjoy the beautiful world around him.

Notes

1. Illinois State Records Act, §5 (2010), <http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=86&ChapterID=2> (24 February 2012).
2. Pennsylvania Right to Know Law, §6 (2008), https://www.dced.state.pa.us/public/oor/pa_righttoknowlaw.pdf (24 February 2012).
3. Philip C. Bantin, "Strategies for Managing Electronic Records: A New Archival Paradigm? An Affirmation of Our Archival Traditions?," *Archival Issues* 23:1 (1998): 17-34.

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